No. 48173-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Roberto Diaz-Lara,

Appellant.

Clark County Superior Court Cause No. 14-1-01948-3

The Honorable Judge Robert Lewis

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT VIOLATED MR. DIAZ-LARA'S VALUED RIGHT TO HAVE HIS TRIAL COMPLETED BY THE FIRST JURY TO HEAR THE CASE.

Mr. Diaz-Lara had a right to a decision from the jury he helped choose at his first trial. *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (citing *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). The trial court infringed this right by declaring a mistrial over his objection.

The mistrial was not prompted by manifest necessity or the existence of extraordinary and striking circumstances. *State v. Robinson*, 146 Wn. App. 471, 479, 191 P.3d 906 (2008); *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982); *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003). This requires reversal of the conviction and dismissal of the charge. *Robinson*, 146 Wn. App. at 484.

A. Review is *de novo* with no deference to the lower court's decision.

Review of this double jeopardy claim is *de novo*. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). A *de novo* hearing is one in which the reviewing court gives "no deference to a lower court's findings," and considers the matter "as if the original hearing

had not taken place." HEARING, Black's Law Dictionary (10th ed. 2014).

The *de novo* standard of review appears to be in tension with oft-quoted language suggesting that great deference should be afforded the trial court. *See* Brief of Respondent, pp. 10-11. It does not appear that any published Washington cases have explored this issue.

In fact, the apparent tension is easily resolved. First, the standard of review and level of deference afforded in state court is controlled by state appellate procedure. It is "within the power of the State to regulate procedures under which its laws are carried out." *Speiser v. Randall*, 357 U.S. 513, 523, 78 S. Ct. 1332, 1341, 2 L. Ed. 2d 1460 (1958). A state court procedure is not subject to federal interference "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201–02, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977) (quoting *Speiser*, 357 U.S. at 523). *De novo* review of double jeopardy claims does not violate any fundamental principle of justice.

Second, the *de novo* standard of review for double jeopardy violations does not apply in civil cases. This permits appellate courts to afford great deference to trial court decisions in civil appeals. *See., e.g., Swain v. Sureway, Inc.*, 190 Wn. App. 1049 (2015) (unpublished opinion), *review denied*, 185 Wn.2d 1028, 377 P.3d 726 (2016) (citing civil cases

addressing trial court's discretion to grant or deny a mistrial).[1] Such deference in civil cases is entirely consonant with *de novo* review of double jeopardy violations in criminal appeals.

Some courts purport to apply a *de novo* standard while also granting the trial court great deference. *See, e.g., State v. Strine*, 176 Wn.2d 742, 751, 753, 293 P.3d 1177 (2013). The source of this deference appears to be federal law. *Id.* (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824) and *Washington, supra*.[2] But—as noted above— federal law does not govern state procedures, absent some violation of a fundamental principle of justice. *Patterson*, 432 U.S. at 201–02.

For all these reasons, the Court of Appeals should review this issue *de novo*. *Villanueva-Gonzalez*, 180 Wn.2d at 979-80. Given the constitutional impact of the trial court's decision, this court should not afford the trial judge deference. HEARING, Black's Law Dictionary (10th ed. 2014).

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[1] As Respondent notes, unpublished opinions may now be cited as persuasive authority. GR 14.1(a).

[2] The *Strine* court also cites *Jones*, 97 Wn.2d at 163. *Jones*, like *Strine*, relies on federal law. *Id.* (citing *Washington, supra.*)

B. *Robinson's* three-part test applies to any mistrial granted over an accused person's objection.

The *Robinson* court distinguished between mistrials granted at the defendant's request and those granted over the defendant's objection. *Robinson,* 146 Wn. App. at 478-480. Although it contrasted defense-initiated mistrials with those sought by the prosecution, it did not make a substantive distinction between mistrials granted at the state's request from those initiated by the court over defense objection. *Id.*

Respondent's argument reflects a misunderstanding of the test's applicability. Brief of Respondent, p. 15 (claiming that the *Robinson* opinion "is specific" in its application to "'*State-initiated* mistrial[s]'") (alteration in Brief of Respondent) (quoting *Robinson,* 146 Wn. App. at 479-80). In fact, the *Robinson* test applies to any mistrial granted over defense objection. *Id.*

Robinson's three-part test derives from *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999)). *See Robinson,* 146 Wn. App. at 479-80. In *Melton,* the court "unilaterally declared a mistrial," apparently without any input from the prosecutor. *Melton,* 97, Wn.App. at 331.

Furthermore, the *Melton* court assembled the three-part test from *Washington, supra,* and from *United States v. Jorn*, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). Although *Washington* involved a

state-initiated mistrial, in *Jorn* the trial judge declared a mistrial *sua sponte* without allowing either party input. *Id.*, at 472-73, 486-87. The *Melton* court did not distinguish between the two situations.

Other cases upon which the *Robinson* court relied confirm that it did not distinguish between state-initiated mistrials and those declared *sua sponte*. *Robinson,* 146 Wn.App. at 478-480 (citing, *inter alia, Jones* and *State v. Browning*, 38 Wn. App. 772, 689 P.2d 1108 (1984)). Both *Jones* and *Browning* involved mistrials declared by the court rather than at the state's request. *Jones,* 97 Wash.2d at 161; *Browning*, 38 Wn. App. at 774.

Robinson's three-part test applies here. Respondent does not contend that it is incorrect and harmful. *Stare decisis* precludes its abandonment. *State v. Trey M.*, No. 92593-3, Slip. Op. ___, 2016 WL 6330476 (Wash. Oct. 27, 2016).

The trial judge acted precipitately, did not give Mr. Diaz-Lara any opportunity to explain his position, failed to accord careful consideration to Mr. Diaz-Lara's interest in having the trial concluded in a single proceeding, and failed to think through available alternatives. *Robinson*, 146 Wn. App. at 479-80.

II. THE COURT'S IMPROPER COMMENT REQUIRES REVERSAL OF MR. DIAZ-LARA'S EXCEPTIONAL SENTENCE.

Respondent concedes that the trial court improperly commented on the evidence. Brief of Respondent, pp. 17-18. This requires reversal, because the record does not "affirmatively show[ ] that no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006); *see also State v. Bogner*, 62 Wn.2d 247, 254, 382 P.2d 254 (1963) ("Reversible error has been committed unless it affirmatively appears from the record that appellant could not have been prejudiced by the trial judge's comments.")

According to Respondent, the jury had only two choices: accept Z.D.G.'s testimony in its entirety or reject it in its entirety. Brief of Respondent, pp. 18-19. There is no basis for this argument.

Jurors could have believed that Z.D.G. had a distorted sense of time, as many young children do. Or they could have believed some of her testimony and rejected other portions. This is especially true given the burden of proof (beyond a reasonable doubt) and Z.D.G.'s recantations and qualifications of her testimony. RP 32-37, 669-699, 1834, 2160-2162, 2191, 2203-2205, 2212, 2214, 2216, 2242-2243, 2346-2350.

The record does not affirmatively show that Mr. Diaz-Lara "could not have been prejudiced." *Bogner*, 62 Wn.2d at 254. The exceptional

sentence must be vacated and the case remanded for a new sentencing hearing. *State v. Brush*, 183 Wn.2d 550, 560, 353 P.3d 213 (2015).

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH" IN VIOLATION OF MR. DIAZ-LARA'S RIGHT TO DUE PROCESS AND TO A JURY TRIAL (INCLUDED FOR PRESERVATION OF ERROR).

Mr. Diaz-Lara rests on the argument set forth in his Opening Brief.

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

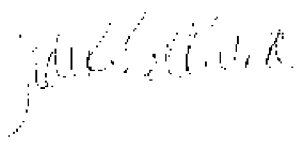
Mr. Diaz-Lara rests on the argument set forth in his Opening Brief.

CONCLUSION

Double jeopardy requires reversal of Mr. Diaz-Lara's convictions and dismissal with prejudice. In the alternative, the exceptional sentences must be vacated and the case remanded for resentencing. If the state substantially prevails on appeal, the appellate court should decline to impose appellate costs.

Respectfully submitted on November 7, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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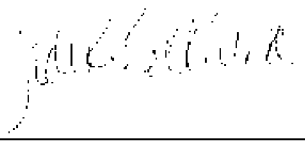
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 7, 2016.



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